SOR KOK WAH & ORS

v.

DRALAND SDN BHD

HIGH COURT MALAYA, MELAKA
AUGUSTINE PAUL JC
[ORIGINATING SUMMONS NO: 24-134-1997]
16 MARCH 1998

LAND LAW: *Strata title - Application for title - Whether s. 6 or s. 7(2) of Strata Titles Act 1985 applicable to land held under qualified title - Whether application for strata titles after completion of building contrary to s. 10A(1) of the Act*

LAND LAW: *Strata title - Maintenance charges - Whether purchasers may claim damages for failure to apply for strata titles*

LAND LAW: *Strata title - Sale and purchase agreement - Term allowing developer to apply for strata title after completion of building - Whether contravenes s. 8 of Strata Titles Act 1985 - Whether an attempt to contract out a statutory provision*

The plaintiffs purchased apartments located in two blocks from the defendant. It was a term of the sale and purchase agreement ('the agreement'), under s. 2.04 of art. II of the agreement ('art. II'), that the defendant was to apply for the strata titles but such obligation to apply arose only when the whole complex had been completed, thereby imposing no time constraint.

It was the complaint of the plaintiffs that the defendant had not obtained the strata titles in respect of the apartments that they had purchased and consequently a management corporation could not be established and the defendant was therefore collecting service charges and surcharges on the service charges from the plaintiffs for the maintenance of their apartments. It was contended that their obligation to pay the 30% surcharge would not arise if they had received the strata titles, within the agreed period of five years from the time the Certificates of Fitness ('CF') were issued in 1990, and had then formed a management corporation. As to s. 2.04 of art. II, the plaintiffs argued that the term amounted to an attempt to contract out of s. 8 of the Strata Titles Act 1985 ('the Act').

In reply, the defendant said that s. 8 of the Act was not applicable, for without a final title, there could be no application for strata titles. This was because the complex, on which the plaintiffs' apartments were situated, was not completed and no final title could be issued. Further, the defendant submitted

that the caveats lodged by other purchasers and the banks had been the cause of the delay in applying for the final title and so it could not be faulted. The issues before the court were: (i) whether s. 2.04 of art. II was valid and enforceable in law; (ii) whether the defendant had made the application for the strata titles within the time-limit prescribed by the Act and the effect of failure to do so; and (iii) the relief that the plaintiffs were entitled to if there was failure to apply for the strata titles within the time limit.

Held:

[1] The use of the word "shall" in s. 8(1) of the Act together with the imposition of criminal sanctions for non-compliance with the requirements of the section makes it compulsory for the proprietor of any alienated land on which there is any completed building to apply for the sub-division of the building within the prescribed time if he has sold any parcel in such building to any person. The completed building must be capable of being sub-divided as provided by s. 6 of the Act which states that any building or buildings having two or more storeys on alienated land held as one lot under final title shall be capable of being sub-divided into parcels.

[1a] The buildings constructed by the defendant had more than two storeys, but the land was held under qualified title. The land therefore did not come within the meaning of s. 6 of the Act.

[2] Section 7(2) of the Act provides that the proprietor of any alienated land held under qualified title which has been duly surveyed and in respect of which a certified plan has been approved by the Director of Survey, may apply for the sub-division of any building thereon.

[2a] In accordance with s. 2.02 of art. II, the land would therefore qualify for an application to be made for the issue of strata titles. The defendant ought to have obtained the certified plan and the survey by the Director of Survey within a reasonable time after the approval of the layout plan. Consequently, the question of surrender of the title for the purpose of realienation was inconsistent with s. 2.02 of art. II as it stated that the land had already been subdivided.

[3] By s. 10A(1) of the Act, a proprietor of any land may apply for the issue of provisional strata titles for a provisional block in respect of the building that has been completed in a lot. In this respect, s. 2.04 of art. II which provided for the application of strata titles only when the whole complex had been completed was contrary to the scheme of phased development authorised by s. 10A(1) of the Act.

[4] Section 20(1) of the Act deals with the time period within which an application for strata titles must be made even when the land has not been sub-divided. Therefore, s. 2.04 of the art. II which gave the defendant time till completion of the entire complex to apply for strata titles was inconsistent with the Act. It amounted to an attempt by the defendant to contract out of a statutory provision.

[4a] The plaintiffs were entitled to have the application made for the issue of strata titles for their benefit by the defendant within the prescribed time and the defendant was precluded from contracting out of that requirement. Hence, s. 2.04 of the art. II was void and unenforceable. The provisions of the agreement that dealt with the payment of the surcharge would also be affected correspondingly. The remaining terms could be severed from the void provisions and they would remain unaffected. The effect was that the defendant was bound by the statutory requirement to apply for the strata titles.

[5] Pursuant to cl. 5.02(c) of the agreement, purchasers were not to lodge any caveat against the title to the land prior to the issue of strata titles. The defendant was therefore liable to the plaintiffs for the consequences flowing from its default in applying for the strata titles. It followed that it had to compensate the plaintiffs for any damage suffered by them as a result of not being issued with the strata titles within the normal period, which was five years from the time of application.

[6] As the defendant had not made an application for strata titles, the five year period was to be taken as a cut-off period and the defendant was therefore liable to compensate the plaintiffs in respect of any damage suffered by the plaintiffs after the five-year period arising from not having strata titles.

Per curiam:

[1] The Act should make provisions for the maintenance of a building intended for strata sub-division including the common property, prior to the formation of a management corporation, as it is common for a building to be completed and occupied well before the issue of strata titles and the formation of a management corporation.

[Plaintiffs' claim allowed with costs.]

Cases referred to:

City Investment Sdn Bhd v. Koperasi Serbaguna CUEPACS Tanggungan Bhd [1985] 1 CLJ 131 ***(refd)***

Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd [1990] 2 CLJ 1044 ***(refd)***

Marles v. Philip Trant & Sons Ltd [1954] 1 QB 29 ***(cit)***

Netherseal Colliery Co Ltd v. Bourne [1889] 14 App Cas 228 ***(cit)***

SEA Housing Corporation Sdn Bhd v. Lee Poh Choo [1982] 2 MLJ 31 ***(foll)***

Stanton v. Brown [1900] 1 QB 671 ***(cit)***

Legislation referred to:

National Land Code 1965, s. 396

Strata Titles Act 1985, ss. 6, 7(2), 8(1), 10A(1), 20(1)

Other sources referred to:

Statutory Interpretations, Francis Bennion, 2nd edn, p 37

Strata Titles in Malaysia, Teo Keang Sood, p 23

For the plaintiffs - Ng Kong Peng; M/s KP Ng & Amardas

For the defendant - Sekar Palaniandy; M/s Sault & Co

Reported by Michele Saw

JUDGMENT

Augustine Paul JC:

The substantial issue raised for determination in this application is the time period within which the proprietor of any alienated land on which there is a completed building capable of being subdivided should apply for the subdivision of the building when he has sold or agreed to sell any parcel in such building to any person.

The defendant is the registered proprietor of all that piece of land held under HS(D) 13965 PT No 1 in Bandar, Kawasan Bandar XXX District of Melaka Tengah State of Melaka measuring in area approximately 6.4409 hectares ("the land"). The tenure of the land is leasehold expiring on 16 June 2085. The defendant was desirous of constructing 11 blocks of apartments known as Garden City Apartments on the land. The 1st, 2nd, 3rd, 4th and 5th plaintiffs entered into separate sale and purchase agreements dated 3 May 1989, 8 September 1988, 31 March 1990, 4 April 1990 and 17 May 1989 respectively with the defendant for the purchase of an apartment each in the complex. All the agreements were worded in identical terms. The apartments agreed to be purchased by the plaintiffs were in Block B2 except in the case of the 4th plaintiff whose apartment was in Block B3. As required by the Strata Titles Act 1985 ("the Act") it was a term of the agreement that the defendant shall apply for the strata title of the various parcels. This is contained in s. 2.04 of the agreement and it reads as follows:

Section 2.04 Strata Title – Article II

> The Company shall apply to the proper authority for the issue of a strata title to each of the individual parcels under the provisions of the Strata Titles Act (No 318) upon completion of the Complex.

The word "Complex" is defined in the agreement as –

> "the Complex" shall mean the building or buildings to be constructed and erected by the Company on the land comprising of the individual parcels, the common property and the car parks, more particularly described in Section 3 of Schedule A hereto and collectively known as Garden City Apartments.

The particulars of the complex as described by s. 3 of Schedule A to the agreement reads as follows:

> 1038 units of apartments consisting of 4 blocks of 5-storey apartments, 4 blocks of 8-storey apartments, 3 blocks of 16-storey apartments and all ancillary buildings commercial premises and works.

It is an agreed fact that the complex as just described has not been completed yet. It was further agreed between the parties that –

(a) A Certificate of Fitness for Occupation dated 24 April 1990 was issued for all the apartments in Phase 1A of the project which included the apartments which the five Plaintiffs had agreed to purchase;

(b) Between the period 17 July 1991 and 19 January 1996 private caveats were lodged over the Master Title to the land by several other purchasers and financial institutions which gave out end-financing to the purchasers;

(c) The Defendant managed to have these caveats removed only between July and August 1997;

(d) From 2 March 1990 to February 1995 the Defendant applied for Surrender and Realienation of the land;

(e) After the process of Surrender and Realienation the Defendant applied for and obtained a Qualified Title for the land on 9 August 1997;

(f) After obtaining the Qualified Title the Defendant applied for a Final Survey of the land on 22 October 1997 and is now awaiting approval for it from the Survey Department;

(g) If the Final Survey of the land is approved, the Final Title will be given for the land. This documents must be issued before an application for strata titles can be made. In accordance with the current practice of the Land Office it takes about five years for a strata title to be issued from the date an application is made for it.

The complaint of the plaintiffs is that the defendant has not obtained the strata titles in respect of the apartments that they had purchased. In consequence thereof a management corporation could not be established as stipulated by the Act and the defendant is therefore collecting service charges from the plaintiffs for the maintenance of their apartments and is appropriating 30% of the charges collected as surcharge. This is in accordance with ss. 12.02 and 12.03 of the agreement which contain provisions for the appointment of an agent to carry out the functions of the management corporation before its formation and the obligation of a purchaser to pay the service charge. The relevant provisions of the agreement with regard to these charges are as follows:

> Paragraph 21(e) Article 1
>
> to pay for the Company's services, as the Managers of the land and the Complex in general and the common property in particular a THIRTY percent (30%) surcharge on all the monies, charges, costs, expenses and payments made or collected by the Company.
>
> Section 5.08 Service Charge to be paid by purchaser
>
> Commencing from the possession date, the Purchaser shall pay half-yearly in advance to the Company or the Managers the service charge (inclusive of the said surcharge under Interpretation 21(e) hereof) in respect of the premises. The first of such payment shall be made on or before the possession date, AND each subsequent half-yearly payment shall be made by the Purchaser to the Company or the Managers within seven (7) days after the date of receipt of the Company's or the Managers' request for such payment.

The plaintiffs argue that if the defendant had applied for and had obtained the strata titles in the normal course of events then their obligation to pay the surcharge of 30% to the defendant would have ceased when the strata titles were issued, that is to say, within the agreed period of five years from 1990. It is their contention that upon issue of the strata titles a management corporation would have been formed as required by the Act with the result that the payment of the surcharge of 30% would not have arisen. The answer to the dispute depends on whether there is a time period within which the defendant must apply for and obtain the strata titles. Accordingly, the parties agreed that the outcome of the application before me is dependent on answers to the following three issues:

(a) whether section 2.04 of Article II of the agreement is valid and enforceable in law;

(b) whether the Defendant has made the application for strata titles within the time-limit prescribed by the Act and, if not, the effect of such failure to do so; and

(c) the reliefs available to the Plaintiffs as a result of the failure by the Defendant to make the application for strata titles within the time prescribed by the Act.

I shall now consider the three issues.

(a) Whether Section 2.04 Of Article II Of The Agreement Is Valid And Enforceable In Law

Section 2.04 of art. II of the agreement which deals with the application for strata titles is couched in wide terms and places an obligation on the defendant to apply for the titles only when the complex has been completed thereby imposing no time constraint. It is an agreed fact that the complex has not been completed. However, Phase 1A which included the apartments purchased by the plaintiffs had been completed in 1990. In his submission learned counsel for the plaintiffs said that this term of the agreement is inconsistent with s. 8 of the Act which prescribes a time period with which an application for strata titles must be made. He said that the object of s. 8 of the Act is to protect purchasers and s. 2.04 of the agreement amounts to an attempt to contract out of a statutory provision and is therefore void. In support of his argument he referred to *SEA Housing Corporation Sdn Bhd v. Lee Poh Choo* [1982] 2 MLJ 31 where Suffian LP in delivering the judgment of the Federal Court said at p. 34:

> In *Daiman Development Sdn Bhd v. Mathew Lui Chin Teck* [1978] 12 MLJ 239 we said at p. 243 that developers are bound by the rules and if an agreement of sale is subject to contract,
>
> > only details may be inserted into the further agreement.
>
> Mr. Chelliah argued that clause 32 is such a detail. With respect we do not agree. In our judgment such details as are inserted into a written agreement must be details consistent, not inconsistent with the Act and rules. Clause 32 is inconsistent with paragraph (r) of rule 12(1).
>
> When Daiman went to the Privy Council ([1981] 1 MLJ 56) their Lordships observed at p. 60, second column:
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> > …. it seems to their Lordships that upon the proper construction of the proforma used in that case the solicitors for the developer there would not be able to include in the contract of sale any term or condition which was not appropriate to effectuate the sale which had been made, including for that purpose, of course, provisions to comply with the requirements of the rules.

Thus it is clear that only terms and conditions designed to comply with the requirement of the rules that may be inserted in a contract of sale of land that is governed by the Act and rules, and that on the contrary terms and conditions which purport to get round the Act and rules so as to remove the protection of home buyers may not be so inserted.

With respect, the provisions in question here are similar to those in *Johnson v. Moreton* [1978] 3 All ER 37 a House of Lords decision, where at p. 49 Lord Hailsham said:

> The policy of the law has been repeatedly used to protect the weaker of two parties who do not contract from bargaining positions of equal strength.
>
> The truth is that it can no longer be treated as axiomatic that, in the absence of explicit language, the courts will permit contracting out of the provisions of an Act of Parliament – as was attempted here – where that Act, though silent as to the possibility of contracting out, nevertheless is manifestly passed for the protection of a class of persons who do not negotiate from a position of equal strength, but in whose well-being there is a public as well as a private interest.
>
> It would appear that only "contracting out" in favour of the weaker party - ie the purchaser – might be countenanced by the courts."

He also referred to *City Investment Sdn Bhd v. Koperasi Serbaguna CUEPECS Tanggungan Bhd* [1985] 1 CLJ 131 at p. 139; [1985] 1 MLJ 285 where Mohammed Azmi FJ said at p. 290:

> The refusal of the respondents to sign a building contract with the appellants under cl. 3 of the agreement is also justified in view of the two offending clauses referred to in the respondents' reply to the statement of defence. It should be emphasized that the respondents' case has never been founded on any allegation that the first agreement is a sham, but this subsequent attempt by the appellants to contract out of the 1966 Act and the 1970 Rules even if successfully executed would be null and void and of no effect. As such the principle enunciated by Geoffrey Lane LJ in *Aldrington Garages v. Fielder* has no application. A device to avoid possible consequence to statutory provision is not wrong if and only if it can be done legitimately. The attempt of the appellants to contract out of the Act is clearly not a device which can be described as legitimate. It is an open defiance of the Housing Developers legislation. Having regard to the policy and objective of Housing Developers Act 1966 and the 1970 Rules made thereunder the protection afforded by this legislation to house buyers is not merely a private right but a matter of public interest which Parliament has intended to protect from being bargained away or enounced in advance by an individual purchaser (see the principle enunciated by the House of Lords in *Johnson v. Moreton* [1978] 3 All ER 37 and applied by this court in *S.E.A. Housing Corporation v. Lee Poh Choo* [1982] 2 MLJ 31.

He then referred to *Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd* [1990] 2 CLJ 1044 at p. 1048; [1991] 1 MLJ 221 where Edgar Joseph Jr J (as he then was) said at pp. 225 - 226:

> In any event, any attempt to contract out of clear statutory provisions aforesaid would be void and wholly ineffective as being contrary to public policy.

In his reply learned counsel for the defendant contended that s. 8 of the Act is not applicable. He said that before an application for strata titles can be made there must be a final title. The final title will be available only when the complex is completed and when the master title for the entire piece of land is surrendered. The defendant is now in the process of applying for the final title. Learned counsel added that the defendant could not have acted earlier as caveats had been lodged by banks and other purchasers excluding the plaintiffs. He concluded by saying that until the final title is issued there can be no application for strata titles and that, in the circumstances, the defendant cannot be faulted.

I shall now consider the relevant parts of the Act to determine whether it imposes a time period within which an application for strata titles must be made. Both parties based their submissions on s. 8 of the Act the material parts of which read as follows:

> 8. (1) The proprietor of any alienated land on which there is a completed building capable of being subdivided under Section 6 shall, within the period specified in subsection (2), apply in accordance with section 10 for the sub-division of the building if at any time he has sold or agreed to sell any parcel in such building to any person.
>
> (2) The period within which the requirement of subsection (1) shall be complied with is as follows:
>
> (a) in the case of a building completed on a date after the commencement of this subsection -
>
> (i) if the sale of, or agreement to sell, any parcel of the building, of the first of such sales or agreements, took place before that date, the period is six months from that date;
>
> (ii) if the sale of, or agreement to sell, any parcel of the building, or the first of such sales or agreements, took place after that date, the period is six months from the date of the sale or agreement or the first of such sales or agreements;
>
> (b) ...

(3) ...

(4) The period specified in subsection (2) may, on application made before its expiry be extended once by the Director by any further period not exceeding three months.

(5) Where an application is not made within the period specified in subsection (2) and in the case of subsection (4) within the period of such extension, if any, applied for and granted in respect of a building, the proprietor shall be guilty of an offence, and liable on conviction to a fine not exceeding five thousand ringgit and to a further fine not exceeding one thousand ringgit for each day the offence continues to be committed.

The use of the word "shall" in s. 8(1) of the Act together with the imposition of criminal sanctions for non-compliance with the requirements of the section gives it a mandatory effect thereby making it compulsory for the proprietor of any alienated land on which there is any completed building to apply for the sub-division of the building within the prescribed time if he has, *inter alia*, sold any parcel in such building to any person. However, it is important to note that the completed building must be capable of being sub-divided as provided by s. 6 of the Act which states that any building or buildings having two or more storeys on alienated land held as one lot under final title (whether Registry or Land Office title) shall be capable of being subdivided into parcels. Even though the buildings constructed by the plaintiff have more than two storeys the land is held under qualified title. As such the land does not come within the meaning of s. 6 of the Act. But s. 7(2) of the Act provides that the proprietor of any alienated land held under qualified title which has been duly surveyed and in respect of which a certified plan has been approved by the Director of Survey, may apply for the sub-division of any building thereon. In the context of the requirements of s. 7(2) of the Act it is pertinent to observe that s. 2.02 of art. II of the agreement provides that layout plans for the land have been approved. The said section reads as follows:

> The company has obtained approval for the layout plans by the proper authority and intends to develop the land in accordance with such plans and any amendments thereof as may be required by the company's architect and/or engineer and approved by the proper authority.

Article I of the agreement defines "the layout plan" as:

> ... the plan submitted by the company to and approved or to be approved by the proper authority for the sub-division of the land and or the Complex into sublots or the individual parcels and include the specifications restrictions and conditions therein and all such reasonable amendments, alterations and

modifications as may from time to time be made or stipulated by the company and/or required by the company's architect and/or engineer and approved by the proper authority.

This means that the defendant has agreed with the plaintiffs that the land has been subdivided. If the land has been subdivided then final documents of title would have been issued. However, before issue of the final documents of title there would have been, as provided by s. 396 of the National Land Code 1965, a survey by the Director of Survey and the issue, *inter alia*, of a certified plan. These are the pre-requisities for the use of a qualified title in applying for strata titles. In accordance with the terms of the agreement the land will therefore qualify for an application to be made for the issue of strata titles. As the object of the Act is to protect the interests of purchasers the defendant ought to have obtained the certified plan and the survey by the Director of Survey within a reasonable time after the approval of the layout plan if he had not done so earlier. In the light of s. 2.02 of art. II of the agreement the question of surrender of the title for the purpose of realienation is inconsistent with the terms of the agreement as it states that the land has already been subdivided with the resultant steps that ought to have been followed. If in fact the layout plan has not been approved that in itself amounts to a breach of contract by the defendant.

Be that as it may, s. 2.04 of art. II of the agreement which provides for the application of strata titles only when the whole complex has been completed is contrary to the scheme of phased development authorised by the Act whereby a proprieter of any land may apply for the issue of provisional strata titles for a provisional block in respect of the building that has been completed on a lot. This is provided by s. 10A(1) of the Act which reads as follows:

> 10A(1) An application under s. 10, except where it relates to a low-cost building or buildings, may include an application for the issue of a provisional strata title or titles for a provisional block or blocks in respect of a building or buildings, being a building or buildings capable according to section 6 of being subdivided, proposed to be, or in the course of being, erected on the lot in question:
>
> Provided that no building or buildings having only one storey shall be included in the application for the issuance of a provisional strata title or titles for the provisional block or blocks.

In commenting on the concept of provisional blocks Teo Keang Sood in his book entitled *Strata Titles in Malaysia* says this at p. 23,

Phased Developments

Under the former provisions of the National Land Code relating to the subdivision of buildings, there were no provisions to enable a single lot of land to be developed in stages by erecting other buildings for subdivision after the subsidiary register has been opened. Under the former provisions, it was necessary for the whole strata scheme to be completed before subdivision could be effected. Accordingly, if a scheme comprises many buildings, the developer can only apply for subdivision upon completion of all the buildings in the said scheme.

In such a situation, it would not be attractive to purchase units in completed buildings as no title can be issued in respect of them yet. This would, in turn, make it difficult for developers to obtain the much needed capital to complete the remaining buildings in the scheme.

(a) The concept of Provisional Block

To overcome the problem faced by developers and purchasers who had already acquired parcels, the 1985 Act introduced the concept of provisional block which allows phased development. The 1985 Act enables the proprietor of the land to indicate on the proposed strata plan any building intended to be a provisional block, then to construct it and to obtain a certified strata plan and subdivision in respect of it.

It will therefore be observed that this scheme enables developers to build without subdividing the land into two or more lots at the outset. Section 20(1) of the Act which deals with the time period within which the proprietor of a provisional strata title shall make an application for the issue of separate strata titles reads as follows:

> 20(1) The proprietor of a provisional strata title shall, as soon as a building in respect of that title has been completed and certified by the public or local authority to be fit for occupation or use, but in any case within six months from the date the building is so certified, make an application for the approval of the Director for the issue of separate strata titles to the parcels in the completed building.
>
> (1A) The period specified in subsection (1) may, on application made before its expiry, be extended once by the Director by any further period not exceeding three months.

It is thus clear that the Act provides specific time periods within which an application for strata titles must be made even when the land has not been subdivided. The defendant ought to have taken the necessary steps to apply for provisional strata title instead of adopting the course that he is now taking. It follows that s. 2.04 of art. II of the agreement which gives the defendant time till completion of the entire complex to apply for strata titles is

inconsistent with the Act. This amounts to an attempt by the defendant to contract out of a statutory provision. As the plaintiffs are entitled to have the application made for the issue of strata titles for their benefit by the defendant within the prescribed time the defendant is precluded from contracting out of this requirement. In this regard *Statutory Interpretations* 2nd Edn by Francis Bennion says at p. 37:

> Where a person is entitled by virtue of legislation to the performance of a duty by another person, and the case is within the principle p*acta privata juris publico derogare non possunt* (a public right is not overridden by the agreements of private persons), then the person under the duty cannot effectively contract out of performing it and the beneficiary cannot effectively waive its performance.

Section 2.04 of art. II of the agreement is therefore void and unenforceable. The defendant cannot therefore rely on that provision as a defence (see *Marles v. Philip Trant & Sons Ltd* [1954] 1 QB 29). Where a contract contains a void term purporting to relieve a person of the obligation to perform a statutory duty, the remaining terms will not be affected provided they can be severed (see *Netherseal Colliery Co Ltd v. Bourne* [1889] 14 App Cas 228; *Stanton v. Brown* [1900] 1 QB 671). The provisions of the agreement that deal with the payment of the surcharge after the usual period of time it takes to approve an application for a strata title will also be affected correspondingly. As the remaining terms can be severed from the void provisions they will remain unaffected. The corollary of striking down s. 2.04 of art. II of the agreement is that the defendant is bound by the statutory requirement to apply for the strata title.

(b) Whether The Defendant Has Made The Application For Strata Titles Within The Time-limit Prescribed By The Act And, if Not, The Effect Of Such Failure To Do So

As the Certificate of Fitness for Occupation was issued to the plaintiffs on 24 April 1990 the defendant ought to have taken immediate steps to apply for strata titles. This has not been done by the defendant. The late application made by the defendant for the issue of the strata titles is due to its delay in having the caveats removed. In fact learned counsel for the defendant conceded that no action was taken to remove the caveats earlier. The defendant could have removed the caveats with considerable ease as pursuant to s. 5.02(c) of the agreement purchasers are not to lodge any caveats against the title to the land prior to the issue of strata titles. The defendant is therefore liable to the plaintiffs for the consequences flowing from its default in applying for the strata titles early. It follows that it must compensate the plaintiffs for any damages suffered by them as a result of not being issued with the strata title

within the normal period which, as agreed, is five years from the time of application.

(c) The Reliefs Available To The Plaintiffs As A Result Of The Failure By The Defendant To Make The Application For Strata Titles Within The Time Prescribed By The Act

The parties have agreed that in the normal course of events an application for strata titles takes five years to be approved. I interpolate to add that where an application has been duly made and has not been approved during the five-year period then different considerations may apply if the delay for approval is not due to the fault of the applicant. In this case the five-year period must be taken as the cut-off period as the defendant has in fact made no application for the strata titles. The defendant is therefore liable to compensate the plaintiffs in respect of any damages suffered by them after the five-year period arising from not having strata titles. Learned counsel for the plaintiffs said that his only prayer with regard to his claim for damages is that the surcharge of 30% that has been collected by the defendants from 1996 and 1997 be refunded with interest and that no further surcharge be made till issue of strata title. He said that this sum would not have become payable if strata titles had been issued as that would have resulted in the formation of a management corporation without any liability to pay the surcharge. I agreed with this submission.

I allowed the plaintiff's claim as prayed with damages as submitted by learned counsel with costs. It is perhaps appropriate for me to say that much of the problems encountered in this case could have been avoided if the Act had made provisions for the maintenance of a building intended for strata subdivision, including the common property, prior to the formation of the management corporation. This is particularly significant as it is common for a building to be completed and occupied well before the issue of strata titles and the formation of the management corporation. Singapore has addressed this problem by enacting the Buildings and Common Property (Maintenance and Management) Act 1973. A similar addition to the Act may be a welcome sign.